

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7009

ORIGINAL

To be argued by
IRVING STEINMAN

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

WILLIAM R. VAN GEMERT, ALBERT A. HENNING, EDWARD E. HOUGHINS, NATHAN PEARLMAN, ELIAS A. CHARIOTT, CHARLES K. DAVIS, ANDREAL HOLDING CORP., SAMUEL A. WEISS, IRWIN L. ISERT, JACK KIRSCHNER, CHARLES FRIEDMAN, H. MICHAEL ALBERS, ABRAHAM STERN, EDWARD KEMPLER, SIMEON A. SCHLOSS, Jr., MARY JANE SCHLOSS SILVERMAN, SIMEON A. SCHLOSS, Jr., and MARY JANE SILVERMAN, Trustees under the Last Will and Testament of Floretta Schloss Wile, DAVID M. BOTSFORD, Mrs. SAMUEL LEMLER, LOUIS DAVIS, Mrs. LEONARD C. DILL, Jr., JOSEPH SCHLAGMAN, NATALIE K. WIGLER, ANN LOUISE DIAMOND, SAMUEL CHARDAVOYNE, WILLIAM M. JONES, Mr. & Mrs. H. DIENEMAN, MILTON HART, MARY LEVIN, FRANCES DAVIS, E. JULIAN DAVIS, ROBERT LEMLICH, ARTHUR FRISCH, MARIAN S. MITCHELL, VINCENTE J. BONNARD, HAROLD M. WHITE and MARGARET C. WHITE, MORRIS BERNSTEIN, WALTER L. EATON, ERNEST G. ANGEVINE, ABRAHAM PERCHICK, COMMITTEE FOR THE ESTATE OF MAX SCHNEIDER, an incompetent, FRANCIS H. SHOUBE, and ALBERT A. ARDITTI, GERTRUDE McNAUGHT, Mrs. J. H. STEIN, JOAN S. BERMAN, I. DAVID STEIN, SARAH E. MORITZ, VIRGINIA W. STAUB, LOUIS BERGLAS, Dr. JACK DIENER, DENNIS J. FINN, BERTHA I. WINER, JOANNE W. FINN and S. EDWARD MITTLER, for and on behalf of themselves and for all other holders of the BOEING COMPANY 4½% Convertible Subordinated Debentures, due July 1, 1980 who are similarly situated.

Plaintiffs-Appellants,

vs.

THE BOEING COMPANY (formerly BOEING AIRPLANE COMPANY), CLAIRMONT L. EGTVEDT, WILLIAM M. ALLEN, EDWARD C. WELLS, JAMES E. PRINCE, LOWELL P. MICKELWAIT, W. L. CAMPBELL, ARTEMUS L. GATES, CRAWFORD H. GREENEWALT, WILLIAM G. REED, D. E. SKINNER, THOMAS R. WILCOX, JOHN O. YEASTING and GEORGE H. WEYERHAEUSER,

Defendants-Appellees.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

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Defendants-Appellees.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

Statement of Issues Presented for Review

1. Where a judgment is granted in favor of a plaintiff class based upon breach of contract, which contract speci-

fies that New York State law shall apply, is pre-judgment interest mandatory pursuant to section 5001 New York Civil Practice Law and Rules?

2. If pre-judgment interest is discretionary, considering the facts and circumstances involved in the case at bar, did the District Court abuse its discretion in failing to award pre-judgment interest to the plaintiff class?

3. Where plaintiff class of convertible debenture holders failed to convert their debentures into the common stock of the defendant corporation before the conversion cut-off date because of the inadequate notice afforded them by defendant corporation, and the damages are thereby affected by fluctuating market prices, is the proper date for the determination of the amount of damages the conversion cut-off date or the date of the highest price within a reasonable time thereafter?

Statement of the Case

This is a consolidated class action involving the call of the convertible debentures of The Boeing Company in 1966. The actions were commenced on behalf of those debenture holders who did not receive notice of the call, failed to convert their debentures into the greatly more valuable Boeing stock, and suffered damage thereby. The class consists of "plaintiffs and all other present and former holders of the Boeing Company 4½% Convertible Subordinated Debentures . . . whose debentures were not surrendered for conversion on or before March 29, 1966."

Eight different actions were commenced and were consolidated for all purposes on October 4, 1966 pursuant to an order of the District Court. That same order certified this consolidated action as a class action under Rule 23(b) (1) and (2) of the Federal Rules of Civil Procedure. The consolidated action was tried, without a jury, before Judge

Ryan on November 15, 16, 17 and 20, 1972. Judge Ryan rendered a decision on November 29, 1973 dismissing the action with costs to be taxed against the plaintiffs.

Plaintiffs appealed to this court from that decision and the judgment entered pursuant thereto. After briefs were filed and oral argument was heard on February 26, 1975, this Court on 7/14/75 rendered a decision which affirmed in part and reversed and remanded in part the judgment of the District Court. 520 F.2d 1373 (2d Cir., 1975).

In its decision this court found that plaintiffs had stated a valid claim; that a duty of reasonable notice [of the call of the debentures] existed, said duty arising out of the contract between Boeing and the debenture holders; and that Boeing had failed to provide the debenture holders with adequate notice of the call of the debentures. This court remanded the action to the District Court for the purpose of assessing damages against the defendants and in favor of the plaintiff class, in conformity with this court's opinion.

The defendants appealed from the decision and judgment of this court, petitioning the United States Supreme Court for the issuance of a writ of certiorari. Said petition was denied on November 11, 1975.

Upon remand from this court as aforesaid, the District Court entered a decision on November 8, 1976, wherein it determined the damages to plaintiff class to be in the sum of \$3,289,359, and denied pre-judgment interest thereon from March 29, 1966. On November 18, 1976 plaintiffs filed a notice of motion for reconsideration of the District Court's decision insofar as such decision refused to award plaintiff class pre-judgment interest. On December 20, 1976 the District Court entered an order which granted plaintiffs' motion for reconsideration and upon such reconsideration, the decision of November 8, 1976 was adhered to. An Order and Judgment in conformity with the decision of November 8, 1976 was entered on December 28

and December 30, 1976 respectively. This appeal is taken from that decision and the order and judgment entered pursuant thereto.

ARGUMENT

POINT I

The District Court erroneously concluded that Section 5001 of the New York Civil Practice Law and Rules was inapplicable to the granting of pre-judgment interest in the case at bar.

In its decision entered November 8, 1976, the court below denied pre-judgment interest on the recovery awarded to the plaintiff class by stating:

“Recognizing the novel nature of the right created by the Court of Appeals, the punitive effect of an award of interest because of the absence of any illegal profits inuring to defendants, I determine within my discretion and in ‘response to considerations of fairness’ (*Blau v. Lehman, supra*, p. 457) that interest will not be awarded.” (Citations omitted) (A-361)*

In reaching this determination, the District Court found that the mandatory language of Section 5001 of the New York Civil Practice Law and Rules, regarding pre-judgment interest, was inapplicable. The Court’s finding rested upon four premises: (1) that the basis of the Federal Court’s jurisdiction over the complaint was principally the Federal Securities Acts of 1933 and 1934; (2) that “There was no breach of contract so the claim upon which plaintiffs seek damages rests on federal law.”; (3) that plaintiffs themselves had stated that “the merit of their claim rests on a finding by the Court of Appeals ‘that BOEING’s act ‘ran afoul of the securities acts.’””; and

* “A” refers to the Appendix, the number immediately thereafter to the Appendix page number.

(4) that "the decision of the Court of Appeals did not determine that BOEING had taken or interfered with any property of plaintiffs." (A-360, 361)

These four premises upon which the District Court's decision was based were erroneous, as follows:

1. The bases of the Federal District Court's jurisdiction over the consolidated complaint was not only the Securities Exchange Act of 1934, the Securities Act of 1933 and the Trust Indenture Act of 1939, but also the principles of pendent jurisdiction and diversity of citizenship. Thus plaintiffs' claims did not rest solely upon federal statutes for jurisdictional purposes. In any event, what the District Court failed to note is that the basis of jurisdiction is not the determinative factor of whether a state law should be applied in a proceeding in federal court. It is the source of the right sued upon which determines the applicable law. Whether state law is applicable depends upon the nature of the issue before the federal court and not the basis for its jurisdiction. In *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538 (CA 2d, 1956) wherein damages were sought under both federal trademark statutes and under common law principles of unfair competition, this Court stated, in Note 1 at pages 540-1:

"But despite repeated statements implying the contrary, it is the *source* of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law. See, Hart & Wechsler, *The Federal Courts and the Federal System* (1953) 690-700. Thus, the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law. * * *

So too in Moore's *Federal Practice*, Vol. 1A, part 2, ¶ 305[3] it is stated at pp. 3052-3053:

"* * * the law to be applied is keyed to the nature of the issue before the court; if non-federal, state sub-

stantive law is applied; if a federal matter is before the court, federal law will be applied."

and at pages 3054-3055:

"* * * a case may be in the federal court on some jurisdictional basis other than diversity and yet the cause of action or determinative issue may be a state claim or issue upon which state law speaks with finality."

In *Wichita Royalty Co. v. City National Bank*, 306 U.S. 103 (1939), federal jurisdiction was not based on diversity of citizenship, but the determinative issue was one of state law and the Supreme Court stated at p. 107: "It was the duty of the federal court to apply the law of Texas as declared by its highest court, *Erie R. Co. v. Tompkins*."

It is clear that the application of state law by federal courts is not limited to actions grounded upon diversity of citizenship but include those situations where the federal court is exercising its jurisdiction over pendent state claims (Moore's *Federal Practice*, Vol. 1A part 2, ¶0.305[3] at p. 3056).

In *Marx & Co. Inc. v. The Diner's Club, Inc.*, 305 F.Supp. 1 (S.D.N.Y. 1975), a case similar to the one at bar, the complaint asserted three causes of action, two based upon federal securities laws and the third being a pendent state law claim for breach of contract. One securities law claim was dismissed, the other was decided in defendants' favor by a jury, and the only cause of action upon which plaintiff recovered was the pendent state law contract claim. In his decision therein, Judge Ward held that pre-judgment interest was mandatory under § 5001, New York Civil Practice Law & Rules. He stated (p. 3 of 305 F. Supp.):

"Defendants argue that state law does not apply in actions where jurisdiction is founded upon a federal ground. Their argument is premised on the assertion that the doctrine of *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 Lawyers Ed. 1188 (1938) re-

quires the application of state law only in cases within the diversity jurisdiction of the federal courts. This contention cannot be sustained. Whether state law is to be applied depends upon the nature of the issue before the federal court and not the basis for its jurisdiction. *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 540 n.1 (2d Cir., 1956); 1A J. Moore, Federal Practice ¶ 305[3] (1974). * * * Thus, it is the source of the right sued upon which is determinative of whether state law should be applied."

The mere fact that the initial jurisdiction of the federal court in the case at bar rested upon federal statutes does not foreclose the application of New York law to a state claim decided by that federal court under the principles of pendent jurisdiction. In its decision remanding this case to the District Court, this Court found that plaintiffs' securities claim was a "colorable one" "sufficient for jurisdictional purposes in any event" (A-105). This Court then reversed the District Court solely upon the pendent state law claim relating to the adequacy of the notice given to the Boeing debenture holders. The damages awarded by the District Court after remand were based upon the failure of Boeing to comply with its duty to give "reasonable notice", which duty arose "out of the contract between Boeing and the debenture holders, pursuant to which Boeing was exercising its right to redeem the debentures" (A-107).

Those commentators who have examined the Court of Appeals' opinion have also concluded that Boeing's liability flows from its violation of state, not federal law. For example, in its *Case Note*, the *Harvard Law Review* concluded that the meaning of the Court of Appeals' decision is that:

"Issuers have a state law duty to give reasonable notice of call to holders of convertible debentures". 89 Harv. L. Rev. 1016, 1019 (1976) (Emphasis supplied.)

Since both the reversal by this Court and the award of damages by the District Court upon remand were based upon a breach of state law by the defendant, state law must also be applied by the District Court on the question of pre-judgment interest.

2. The second premise for its denial of pre-judgment interest below was that no breach of contract existed. A careful examination of the decision of the Court of Appeals shows that it held merely that the federal law claim was colorable—sufficient for assumption of jurisdiction by the federal courts over the pendent state law claims—and then reversed the lower court on the ground that under state laws Boeing had failed to give adequate and reasonable notice of the redemption call, and had failed “to adequately apprise the debenture holders what notice would be given of a redemption call.”, then going on to state:

“The duty of reasonable notice arises out of the contract between Boeing and the debenture holders pursuant to which Boeing was exercising its right to redeem the debentures. * * *.” (A-107)

Since the duty which defendant breached arose from the contract between defendant and the plaintiff class, a fortiori, the contract itself was breached.

3. It has never been the opinion or position of plaintiffs' counsel that the decision of the Court of Appeals was based upon violations of federal law. Indeed, the very memorandum referred to by Judge Ryan, within the very paragraph paraphrased by him in his opinion wherein he reached his conclusion, states that “the Court of Appeals did not expressly state that Boeing had violated the securities acts” and “the claim was at least sufficiently meritorious to provide federal jurisdiction.” (R 10 at page 18).*

* “R” refers to the Record on Appeal, the number immediately thereafter to the document.

Again, providing grounds for federal jurisdiction is not the same thing as determining what law was breached so that damage are awarded. There is no question but that this Court's reversal of the District Court on the initial question of liability was based on violations of New York State law by the defendant. Kass, Goodkind's Reply Memorandum stated that " * * * the Court of Appeals' decision has rendered the claim that Boeing ran afoul of the securities acts valid to the extent that its merit permeates the court's entire decision. * * * " (R 10 at page 18) This is *not* saying that the Court of Appeals' decision was that defendant had violated the federal securities acts. What defendant violated was state law.

4. The last premise set forth below as a basis for refusing to apply § 5001 CPLR as to pre-judgment interest was that " * * * the decision of the Court of Appeals did not determine that Boeing had taken or interfered with any property of plaintiffs. * * * " (A-361).

The pertinent language of § 5001 CPLR is as follows:

"Interest shall be recovered * * * because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property * * * "

This language clearly contemplates the award of pre-judgment interest not only, as the Court below apparently believed, if property of the plaintiff is "taken or interfered with", but more broadly, if the acts of defendant deprive plaintiff of his property or prevent his possession or enjoyment thereof. The act of defendant need not be knowing or intentional as the section quoted speaks in absolute terms.

The realities of this case—where through the acts or omissions of defendant plaintiff class was unable to secure the property which properly belonged to them (the common stock of Boeing) for a period of almost eleven (11) years, the basis of this Court's decision remanding

this case to the District Court for the determination of damages, the fundamental concepts of contract law, and the supremacy of substance over form—all join to controvert the District Court's interpretation.

Had the District Court found that the breach of contract claim was the basis for the award of damages, as indicated in the Court of Appeals decision, it need not have made any further conclusions, as § 5001 CPLR also states that "Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, * * *". In fact, Boeing's wrongful breach of contract, which this Court found as the basis for reversing the District Court, operated to also deprive the plaintiff class of its possession, title and enjoyment of the stock of Boeing (i.e. property) for the past ten (10) or more years.

POINT II

Section 5001(a) of the New York Civil Practice Law & Rules is applicable to the case at bar and pre-judgment interest is mandatory.

New York State law is the applicable law to be applied by a federal court deciding pendent New York State law claims (Point I, *supra*). So too, defendant and plaintiffs agree that New York State law was the basis of this Court's decision and therefore forms the basis for determining the award of pre-judgment interest (see Point III of this Brief). The issue now presented is what is the law of New York respecting the award of pre-judgment interest on the damages in the case at bar.

Pre-judgment interest, in an action at law, where the damages awarded were based upon breach of contract or interference with property, its title, possession or enjoyment, under New York law, is governed by § 5001(a) of *New York's Civil Practice Law and Rules*. That section states as follows:

"§ 5001. Interest to verdict, report or decision

(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion."

This language is mandatory, not discretionary, and the acts of defendant which formed the basis of the claim need not have been intentional or even knowing, since equities do not and cannot enter into the court's determination. The *Practice Commentary to McKinney's Consolidated Laws of New York, Civil Practice Law and Rules*, § 5001(a) at page 525, states: "* * * Where the contract or property damage case is brought at law, interest is recoverable as matter of right. * * *." The wording of § 5001(a) CPLR makes no distinction whatsoever between negligent and intentional violations of plaintiffs' property rights and requires pre-judgment interest to be awarded in all actions founded upon loss of property rights or breach of contract. (See, *Legislative Studies and Reports to § 5001(a) CPLR*, Vol. 7B, McKinney's Consolidated Laws of New York, Civil Practice Law and Rules, pages 526 *et seq.*). In fact, the only awards of damages which are not subject to the mandatory provisions of § 5001(a) CPLR are those involving personal injuries, punitive damages and actions in equity. None of these exceptions are applicable to the case at bar. Defendant has claimed that this action is of an equitable nature, thereby making pre-judgment interest discretionary. However, no equitable relief has been sought by plaintiffs (A-002 to 027), and no equitable relief has ever been awarded in this case by the court. Actions for damages, such as the case at bar, are not maintainable in equity, and if damages are to be awarded in equity they are awarded as an incident of some other special relief. (1

Pomeroy's Equity Jurisprudence, 5th Ed. page 437.) The action at bar is, and always was, an action at law.

In *Spector v. Mermelstein*, 485 F.2d 474 (2d Cir. 1973) the Court of Appeals held that interest was mandatory under § 5001 and discussed that section, making the following observations: (1) that pre-judgment interest pursuant to the mandatory provisions of § 5001 was necessary to enforce a policy of making the plaintiff whole (citing *Prager v. New Jersey Fid. & Plate Glass Inc. Co.*, 245 N.Y. 1, 5-6); (2) that even where there is a negligent interference with a proprietary interest such as a legal right the statute applies; (3) that the statutory exception for actions of an equitable nature contained in § 5001 is limited to those actions in which equitable relief, rather than damages is sought, and the exception does not apply to an action for damages based upon a breach of fiduciary duty.

It is clear that the decision of this Court in the case at bar as to the liability of defendant to the plaintiff class was based upon breach of contract (A-87 to 116) and/or involved the interference by defendant with the plaintiffs' use, possession or enjoyment of their property. In view of this fact, the provisions of § 5001(a) CPLR require the award of pre-judgment interest to the plaintiff class.

POINT III

Defendant Boeing has conceded that this Court's decision was based upon a pendent state law claim and that therefore New York's law on pre-judgment interest should apply.

Although Judge Ryan interpreted this Court's decision and the award of damages to the plaintiff class as resting upon federal law, both plaintiffs and defendant appear to be in agreement otherwise.

Defendant Boeing has long taken the position that the Court of Appeals decision was based solely upon state

law and in fact created "sweeping new rights" under New York State Law. In its petition for a writ of certiorari (cert. den. 423 U.S. 947) Boeing stated:

"That this is an appropriate case for review on certiorari is demonstrated not only by the fact that the Court of Appeals decided an important issue of federal jurisdiction in holding that a federal court may entertain *exclusively state law claims* when it finds that the federal law claims on which jurisdiction has been premised are only 'colorable' and not 'substantial', as required by this Court's decision in *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) but also by the fact that the Court of Appeals rendered an important and novel decision with respect to the relationship between a corporation and its debenture holders *under state law* which the highest court of New York has not yet decided and *which creates sweeping new rights for such holders.*" (emphasis ours).

In its Memorandum in Opposition to Motion of Certain Plaintiffs to Adjudicate Damages (R 8), Boeing states at p. 18:

"* * * the Court of Appeals did not decide any substantive questions of federal law; rather its grounds for decision were based on the creation of a new right under New York law. In such a situation, a federal court in New York would apply the law of the State of New York to the question of whether pre-judgment interest should be awarded. * * *"

In its Reply Memorandum in Further Opposition to the Motion of Certain Plaintiffs to Adjudicate Damages Boeing states at p. 8:

"* * * The Court of Appeals simply did not decide that plaintiffs had stated claims under the Federal Securities Laws, but only that jurisdiction over all of plaintiffs' claims could be retained by the federal court

because their Securities Acts claims were sufficiently 'colorable.' 520 F.2d at 1380-82. The case was clearly decided as a new state or common law action—and nothing more. 520 F.2d 1383-86. * * *

As plaintiffs have always maintained that the basis of the Court of Appeals decision is state law, both Boeing and plaintiffs are in total accord. Defendant and plaintiffs are also in agreement that because of the state law basis, state law must be applied to the issue of pre-judgment interest. In its verified answers to plaintiffs' interrogatories, Boeing took the position that the law of the State of New York would apply with respect to the award of pre-judgment interest. Plaintiffs' Interrogatory 15 and Boeing's response thereto are as follows:

"Interrogatory No. 15

15. Is it Boeing's position that the interest to be added to the damages is governed by:

- (a) the rule applicable in the courts of the State of New York, or
- (b) the rule applicable in the Southern District of New York, or
- (c) some other rule, in which case state the rule.

Answer to Interrogatory No. 15

15. It is Boeing's position that a federal court sitting in New York, would be required to apply the law of the State of New York with respect to the interest if any, to be awarded to Debenture holders." (A-209)

POINT IV

Assuming pre-judgment interest is discretionary, the equities favor the granting of such interest in the case at bar.

Assuming arguendo that the provisions of § 5001(a) CPLR are inapplicable, New York law, and even federal

law were it applicable, would require the awarding of pre-judgment interest to plaintiff class under the discretionary powers of the Court. The equities in the case at bar strongly favor the award of such pre-judgment interest.

It is unclear from the decision below whether Judge Ryan was applying federal or New York State rules where in his "discretion" he denied pre-judgment interest to the plaintiffs "in response to considerations of fairness" (A-361). Judge Ryan apparently believed that any award of pre-judgment interest would be punitive in effect because he could not see any illegal profits inuring to the defendants. Such a determination ignores or misreads the realities and equities of this case.

The District Court held that the members of the plaintiff class lost their rights to convert their debentures as of March 29, 1966 and determined the damages in favor of the class, as of that date, to be in the amount of \$3,289,359. For the past 10½ years plaintiffs have been deprived of the use of such monies and benefits which could have been derived therefrom and Boeing, the wrongdoer, has had the advantage thereof. Clearly the District Court's decision rewards Boeing for its illegal acts by permitting and in fact sanctioning Boeing's use of its funds without charge while at the same time the decision penalizes plaintiffs by not fully recompensing them for their loss. It must be considered that Boeing's improper use of plaintiffs' funds during the past approximately 11 years resulted from Boeing's wrongful breach of its fiduciary duty to plaintiffs and as such represents an illegal gain and profit inuring to Boeing. In fact, had Boeing been required to go into the money markets over the past 11 years and borrow the same \$3,289,359 at the prime rate, its interest expense would have exceeded the pre-judgment interest sought by plaintiff class herein, and to the extent of such difference Boeing would still be illegally profited by its wrongful acts. Boeing's position and that accepted by the District Court that no illegal profits inured to Boeing because of the wrongs it committed, is contrary to the facts.

Both New York State and federal courts have held that pre-judgment interest is not punitive in nature, but is awarded in an attempt to make the plaintiff whole. In *Lesjac Realty Corp. v. Mulhauser*, 251 N.Y.S.2d 62, the Court stated at page 64:

"The award of interest is founded solely upon the theory that there has been a deprivation of the use of money or its equivalent, and that unless interest be added, the party aggrieved is not made whole. Interest is compensation for the use of money. Interest will result only from a status which is in the nature of a debtor and creditor relationship whereby the amount involved is known or reasonably ascertainable by the parties affected. The interest must be an integral part of the debt. *Chester v. Jumel et al.*, 125 N.Y. 237, 26 N.E. 297. It is necessary that the claim for damages shall represent a pecuniary loss which is susceptible of computation with reasonable certainty, or by means of established market values or other generally recognized standards. *Faber v. City of New York*, 222 N.Y. 255, 118 N.E. 609. * * *

See also, *DeLong Corp. v. Morrison-Knudsen Co.*, 14 N.Y. 2d 346, 251 N.Y.S.2d 657.

In *Sanders v. John Nuveen & Co., Inc.*, 524 F.2d 1064, (1975), the Court of Appeals for the 7th Circuit in affirming a District Court award of pre-judgment interest stated at page 1075:

"Appellants argue that the award of pre-judgment interest was erroneous because the trial court failed properly to weigh the equities between the plaintiffs and the defendants. It is true that the award of pre-judgment interest is responsive to considerations of fairness. *Blau v. Lehman*, 368 U. S. 403, 414. But the imposition of pre-judgment interest is in its origin a form of compensation, not a penalty. As the Supreme Court said in *Rodgers v. United States*, 332 U. S. 371, 373:

'As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained.'

Thus, if a defendant has deprived the plaintiff of a specific sum of money, he has also deprived plaintiff of the interest which the money would have earned in the absence of defendant's breach of duty; unless the plaintiff is paid interest for the entire time that he is deprived of the use of his money, he will not receive full compensation.

Nevertheless, for various reasons it may be inequitable to impose such an extra payment on the defendant. For example, if final judgment is unreasonably delayed due to the actions of the plaintiff, interest should be suspended for the period of the delay. Or, if the interest would in effect act as a penalty on a relatively innocent defendant, the court has discretion to refuse to award interest. Compare *Blau v. Lehman*, 368 U. S. 403, with *Norte & Co. v. Huffines*, 416 F. 2d 1189 (2d Cir. 1969), cert. denied *Muscat v. Norte & Co.*, 397 U. S. 989.

In this case the award of interest was proper. Plaintiffs suffered the loss of use of the money which they had invested in WH notes (except for the portion recovered from the WH Liquidating Trust). The extended delay between the loss and final judgment was not caused by any dilatory tactics by the plaintiffs. And there are no countervailing equitable considera-

tions making the award unfair to Nuveen. It is true that Nuveen had no actual knowledge of the fraud, but we have nonetheless held that Nuveen is responsible for serious omissions in the performance of its statutory duty as an underwriter. Although Nuveen did not receive the money which the plaintiffs lost, recovery is predicated on compensation of the victim, not on a surrender of unjustified profits. Nuveen aided in setting up the liquidating trust which gave partial recovery to the plaintiffs, but Nuveen has had the benefit of the trust in that all payments from the trust have reduced Nuveen's liability. The district court was thus correct in awarding prejudgment interest."

Pre-judgment interest in the case at bar is required by the equities of this case. Such interest is an integral part of plaintiffs' damages, which damages were proximately caused by and flow from Boeing's wrongful breach of its fiduciary and contractual duty to plaintiffs. It is irrelevant whether such breach was intentional or initially made in good faith; the plaintiffs are entitled to just compensation.

POINT V

The measure of damages should be based upon New York's fluctuating value rule.

The general rule of damages that a plaintiff shall recover an amount based upon the market value of the property at the time of the breach of contract or conversion is inapplicable to the case at bar. The property involved herein, whether under a breach of contract theory or a conversion theory (*Mayer v. Momzo*, 221 N.Y. 442; *Hartford Accident & Indemnity Company v. Walston & Co.*, 22 N.Y.2d 672), involves securities which due to their very nature have a fluctuating value.

The New York State Court of Appeals in *Baker v. Drake*, 53 N.Y. 211, discussed and formulated New York's fluctuating value damage rule. The Court therein decided that: (1) the form of action, be it contract or tort, is irrelevant since "In civil actions, the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort."; (2) the rule should be formulated so that a fair indemnity for plaintiff is reached; (3) the measure of damages should be the highest price reached by the stock within a reasonable time after notice to the injured party so that he may replace the stock or collect only such damages as he would have suffered had he replaced the stock within that time.

As stated in the case of *Mayer v. Momzo*, supra:

"The rule is that a person whose stocks have been converted is entitled to a reasonable time after notice of the conversion with which to determine whether he would purchase other stocks in the place thereof and that he may use as a basis for his claims of damages resulting from the conversion the highest prices which have prevailed during such reasonable period. (*Baker v. Drake*, 53 N.Y. 221). It has been held under varying circumstances that thirty days or fifteen days or sixty days would be such reasonable period. (*Colt v. Owens*, 90 N.Y. 368; *Wright v. Bank of Metrolpolis*, 110 N.Y. 237; *Minor v. Berveridge*, 141 N.Y. 399; *Mullen v. Quelin & Co.*, 195 N.Y. 109) (221 N.Y. 442, 446-447)"

The debentures held by plaintiff were convertible into Boeing stock, the price and value of which varied according to fluctuations in the public securities markets. Boeing's wrongful breach prevented the plaintiff class from converting their debentures into the more valuable Boeing stock; in order to obtain such stock the plaintiff class would have had to purchase it in the open market. The

length of time considered reasonable for such purchases by the New York courts have varied from 15 days through 60 days or more (*Mayer v. Momzo*, supra). The highest value of Boeing's common stock (into which the debentures were convertible) within 30 days after Boeing wrongfully cut off plaintiffs' conversion privileges on March 29, 1966, was reached on the 16th day. The value of each debenture on that date if it were converted into Boeing common stock would be \$364 per \$100 principal amount of debenture. Based upon such values the actual damage sustained by plaintiff class exclusive of interest amounted to \$4,026,762.25 rather than the \$3,289,359 found by the Court below.

CONCLUSION

For the reasons set forth herein, damages should be awarded to plaintiffs and all members of the plaintiff class in the sum of \$4,026,762.25 together with interest at the legal rate from March 29, 1966 to the date of payment.

Respectfully submitted,

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SAMUEL WEINSTEIN

LAWRENCE SUCHAROW

Of Counsel

THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT
 VAN GEMERT
 VS
 BOEING

AFFIDAVIT
 OF SERVICE

STATE OF NEW YORK,
 COUNTY OF NY, ss:

AFRIM HASKAJ

deposes and says that he is over the age of 18 years and resides at 1481 42nd street Bklyn NY

That on the 31st day of January, 1977 19 at
 he served the annexed brief for plaintiffs-appellants upon
 those parties specified below
 in this action, by delivering to and leaving with said attorneys
~~XXXX~~ two true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 31st
 day of January, 1977 19

Roland W. Johnson
 ROLAND W. JOHNSON
 Notary Public, State of New York
 No. 4509705
 Qualified in Delaware County
 Commission Expires March 30, 19

Afrim Haskaj

Service upon:

1. Davis Polk & Wardwell, One Chase Manhattan Plaza
2. Kass Goodkind Wechsler & Gerstein, 122 East 42nd Street, NY, NY
3. Nathan Mannheimer Asche Winer & Friedman, 230 Park avenue, NY, NY 10017